U.S. MERIT SYSTEMS PROTECTION BOARD

Case Report for January 13, 2023

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BOARD DECISIONS

Appellant: Chenshiang Lin
Agency: Department of the Air Force
Decision Number: 2023 MSPB 2
Docket Number: DC-0752-15-0431-I-1
Issuance Date: January 9, 2023
Appeal Type: Removal

Performance Based Actions

The appellant held a Senior General Engineer position, which under the Lab Demonstration Project was subject to a contribution-based compensation system (CCS) rather than the traditional performance-based system under chapter 43. Under the applicable CCS, contribution in engineering positions is assessed using four factors, which are averaged together to determine an individual's overall CCS score. For each factor, the Lab Demonstration Project defines four "broadband levels" of contribution, levels I through IV, and an individual's broadband level and pay dictate the expected level of contribution.

When the agency determines that an employee is not adequately contributing, one option provided in the CCS is a Contribution Improvement Plan (CIS), comparable to a performance improvement plan (PIP) under chapter 43. If an employee fails to demonstrate

increased contribution during the CIP, or if his contribution deteriorates in any area within two years from the start of the CIP, the Lab Demonstration Project provides management with discretion to reduce the pay or remove the employee without a new CIP.

In January 2013, the agency placed the appellant on a 120-day CIP, based on his overall contribution score of 2.73, which was below the 3.05 score expected of him given his Level III broadband level and pay. In September 2013, the agency advised him that he had satisfactorily completed the CIP, but remained subject to removal if his contribution deteriorated during the following 2-year period. In January 2015, the agency determined that his overall contribution score for the preceding evaluation period (October 2013 to September 2014) was 2.73, again below the required score of 3.05. In March 2015, the agency removed the appellant for failure to demonstrate an adequate level of contribution within the 2-year period following his CIP. This appeal followed.

The administrative judge affirmed the appellant's removal. In doing so, the administrative judge applied the standard applicable to a chapter 43 performance-based action, with adjustments to account for differences between chapter 43 and the Lab Demonstration Project. She further found that the appellant failed to prove his affirmative defenses of age discrimination and reprisal for EEO activity. The appellant petitioned for review.

Holding: The Board found that the administrative judge was generally correct in applying the elements of proof applicable to chapter 43 actions, as modified to account for the specific requirements of the Lab Demonstration Project. However, in light of the intervening decision in *Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355, 1361 (Fed. Cir. 2021), the Board found that the agency was also required to justify the appellant's CIP, i.e., to show that his contributions were unacceptable prior to the imposition of the CIP. The Board remanded the case for further adjudication.

1. The Board found that the administrative judge correctly began her analysis as if the appellant had been unsuccessful in completing a PIP under chapter 43, modifying the elements of a chapter 43 charge to account for the specific requirements of the Lab Demonstration Project. At the time of the initial decision, the Board's case law stated that in an appeal of a typical performance-based action under chapter 43, the agency was

required to prove the following by substantial evidence: (1) OPM approved its performance appraisal system and any significant changes thereto; (2) the agency communicated to the appellant the performance standards and critical elements of his position; (3) his performance standards were valid under 5 U.S.C. § 4302(c)(1); (4) the agency warned him of the inadequacies of his performance during the appraisal period and gave him an adequate opportunity to demonstrate acceptable performance; and (5) after an adequate improvement period, his performance remained unacceptable in at least one critical element.

2. The Board observed that the Lab Demonstration Project procedures essentially mirror, in modified form, the requirements of chapter 43 that an agency communicate to an employee his position's performance standards and critical elements, warn him of inadequacies of his performance, and provide him with an adequate opportunity to improve. The Lab Demonstration Project also resembles chapter 43 in providing that management has discretion to initiate a reduction in pay or removal if the employee either does not improve during the CIP or his contribution improves but deteriorates again within 2 years of the beginning of the CIP. The Board found, however, that proof of OPM's approval of the Lab Demonstration Project was not required, as it would be in an appeal of a chapter 43 action.
3. While the case was pending on review, the U.S. Court of Appeals for the Federal Circuit issued *Santos v. National Aeronautics & Space Administration*, 990 F.3d 1355, 1361 (Fed. Cir. 2021), in which it recognized an additional element in a chapter 43 appeal, namely, that the agency "must justify institution of a PIP" by proving that the employee's performance was unacceptable before the PIP. The Board found that, in light of the similarities between the Lab Demonstration Project and chapter 43 procedures, *Santos* was applicable, and that the agency was required to show that the appellant's CIP was justified because his contribution was unacceptable prior to his placement on the CIP. The Board remanded for further adjudication on that issue.
4. The Board also instructed the administrative judge to determine on remand whether the CIP period itself, as opposed to the 2-year period that followed the start of the CIP, provided the appellant an opportunity to improve.
5. Finally, the Board directed the administrative judge to reassess the appellant's affirmative defenses in light of its recent decision in *Pridgen v. Office of Personnel Management*, 2022 MSPB 31.

Appellant: Karl Brookins
Agency: Department of the Interior
Decision Number: 2023 MSPB 3
Docket Number: DE-531D-18-0028-I-1
Issuance Date: January 10, 2023
Appeal Type: Denial of Within-Grade Increase

Within-Grade Increase
Election of Remedies

The appellant, a Fishery Biologist, became eligible for a within-grade increase (WIGI) from a GS-12 step 5 to step 6. On September 15, 2017, the agency informed him that it was denying his WIGI. The appellant requested reconsideration of the WIGI denial, and on October 10, 2017, the agency denied his request for reconsideration.

The appellant timely filed a Board appeal, alleging that the agency committed personnel practices under 5 U.S.C. § 2302(b)(2) and (b)(12). The administrative judge issued an order questioning the Board's jurisdiction because the appellant was a bargaining unit employee, WIGI denials were subject to the negotiated grievance procedures of the applicable collective bargaining agreement (CBA), and the appellant had not alleged discrimination after a final decision, as required to elect a Board appeal under 5 U.S.C. § 7121(d). In response, the appellant argued that 5 U.S.C. § 7121(g) allows for an appeal directly to the Board when the aggrieved employee alleges a prohibited personnel practice (PPP) under 5 U.S.C. § 2302(b)(2)-(14) in connection with an action covered under negotiated grievance procedures. The administrative judge dismissed the appeal without a hearing, finding that the appellant's only recourse was through the negotiated grievance procedure. This petition for review followed.

Holding: Under 5 U.S.C. § 7121(g), an employee who claims to have been affected by a PPP other than a PPP under 5 U.S.C. § 2302(b)(1) may file an appeal of a WIGI denial under 5 U.S.C. § 5335(c), even the employee is covered by a CBA that includes WIGI denials in its negotiated grievance procedures.

1. An agency's decision to deny a WIGI is appealable to the Board under 5 U.S.C. § 5335(c), provided that the employee first requests reconsideration from the agency and the agency affirms the denial. Nevertheless, if a WIGI denial is also grievable under a negotiated grievance procedure, it is subject to the election of

remedies provisions of 5 U.S.C. § 7121. Generally, if an employee is covered by a CBA that includes WIGI denials in its negotiated grievance procedures, those procedures are the exclusive procedures for appealing the denial. 5 U.S.C. § 7121(a)(1).

2. Under the Civil Service Reform Act of 1978 as originally enacted, the only exception to this general rule was found at 5 U.S.C. § 7121(d), which allows for Board appeals in cases where the employee alleges that he has been affected by a PPP under 5 U.S.C. § 2302(b)(1), i.e., prohibited discrimination. However, in 1994, Congress amended 5 U.S.C. § 7121 by adding a new subsection (g) and providing another exception for cases in which employees allege that they have been affected by a PPP other than under 5 U.S.C. § 2302(b)(1). This exception applies here.
3. The Board overruled *Hunt v. Department of Veterans Affairs*, 88 M.S.P.R. 365 (2001), and other cases issued after the enactment of 5 U.S.C. § 7121(g), including *Caracciolo v. Department of the Treasury*, 105 M.S.P.R. 663 (2007), to the extent those cases state that WIGI denials, if covered by a CBA, are not appealable to the Board even when an aggrieved employee has alleged a PPP other than a PPP under 5 U.S.C. § 2302(b)(1). The Board further found that, to the extent the regulation at 5 C.F.R. § 531.410(d) is inconsistent with 5 U.S.C. § 7121(d) and (g), the statute controls.
4. Turning to the facts of the case, the Board found that the appellant had not previously filed a grievance or a complaint with the Office of Special Counsel, and thus appeared to have made a valid election under 5 U.S.C. § 7121(g) to file an appeal directly with the Board.
5. The Board noted, however, that thus far the appellant had only made bare assertions of PPPs under 5 U.S.C. § 2302(b)(2) and (b)(12), and neither party had briefed whether he was required to do anything more to establish jurisdiction. Because appellant did not receive notice that he needed to do anything further regarding his PPP allegations to establish jurisdiction, the Board remanded the case for the administrative judge and the parties to address the issue as necessary.
6. The Board also directed the administrative judge to rule on the appellant's objections to the Order and Summary of Telephonic Status Conference. The Board denied the appellant's Request for Order to Preserve Computer Files, but stated that the administrative judge should afford the parties another opportunity to initiate discovery.

Appellant: Renate M. Gabel
Agency: Department of Veterans Affairs
Decision Number: 2022 MSPB 4
Docket Number: PH-1221-16-0256-W-1
Issuance Date: January 11, 2023
Appeal Type: Individual Right of Action

Whistleblower Protection – Jurisdiction

The appellant, a Licensed Practical Nurse, filed a complaint with the Office of Special Counsel (OSC), alleging that the agency retaliated against her for making protected disclosures under 5 U.S.C. § 2302(b)(8) and engaging in protected activity under 5 U.S.C. § 2302(b)(9)(A). After exhausting her remedies with OSC, she filed an individual right of action (IRA) appeal with the Board. Based on the written record, the administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant failed to make a nonfrivolous allegation that she made a protected disclosure or otherwise engaged in protected activity. In the alternative, she found that the appellant had failed to make a nonfrivolous allegation that any of her supposed protected disclosures or alleged protected activity was a contributing factor in any of the personnel actions taken against her. The appellant petitioned for review.

Holding: The Board affirmed the initial decision and dismissed the appeal for lack of jurisdiction.

1. The appellant alleged in her OSC complaint that the agency discriminated against her based on her disability and engaged in a pattern of abuse concerning her requests for leave under the Family and Medical Leave Act of 1993 (FMLA) and requests for reasonable accommodation. She vaguely claimed that she attempted to bring this wrongdoing to her supervisors' attention, but she failed to provide with any specificity the content of her alleged disclosures, to whom they were made, the dates they were made, or how they were made. The Board agreed with the administrative judge that the appellant's vague and nonspecific allegations of disclosures of wrongdoing are insufficient to constitute nonfrivolous allegations of protected disclosures.
2. As to the alleged protected activity, the appellant alleged that she filed an EEO complaint with the agency alleging discrimination and retaliation, and that the agency retaliated against her as a

result. However, the Board only has IRA jurisdiction over EEO activity covered under 5 U.S.C. § 2302(b)(9)(A)(i), i.e., if the activity seeks to remedy reprisal under 5 U.S.C. § 2302(b)(8). Here, the appellant did not allege that the substance of her EEO complaint concerned remedying a violation of 5 U.S.C. § 2302(b)(8). Because the appellant's EEO activity was covered under 5 U.S.C. § 2302(b)(9)(A)(i), the Board agreed with the administrative judge that the appellant failed to nonfrivolously allege that she engaged in protected activity for purposes of establishing IRA jurisdiction. Accordingly, the Board affirmed the dismissal of the appeal.

3. On review, the appellant asserted that the agency engaged in discrimination, retaliation, and "abuses of authority and gross mismanagement in connection with her requests for FMLA leave," and attached allegedly new supporting evidence. However, because the appellant did not challenge the administrative judge's findings that she failed to nonfrivolously allege that she made protected disclosures or otherwise engaged in protected activity, the Board found that she provided no basis for disturbing the initial decision.

COURT DECISIONS

NONPRECEDENTIAL:

Bailey v. Office of Personnel Management, No. 22-2125 (Fed. Cir. Jan. 9, 2023) (AT-844E-16-0231-I-2) The court granted the petitioner's motion to dismiss.